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No. 90-1224

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS, and ROBERT SCHMIDT,

Petitioners,

v.

CITIBANK (SOUTH DAKOTA), a National Banking Association, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois First Judicial District

CERTAIN RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Does this Court have jurisdiction to grant a writ of *certiorari* where no federal question was implicated by the court rendering the decision sought to be reviewed?

2) Individuals were sued to collect delinquent credit card account balances which they admittedly owed. After default judgments were entered against them, the individuals voluntarily paid those judgments and stipulated to dismiss all actions pending against them resulting from the default judgments. While two of the individuals' cases were still pending, each of them filed a separate lawsuit in a court of concurrent jurisdiction seeking to set aside the judgments on allegations of a lack of personal service upon them. Under such circumstances, did the court properly affirm the dismissal of the subsequent complaint when Illinois law requires that any challenge to the legitimacy of a judgment be made only in the court which entered the judgment?

3) Do the actions of private process servers or the attorneys hiring them in filing and completing allegedly false returns or affidavits of service constitute state action on the part of those individuals?

4) Does the filing of a purportedly false affidavit or return of service by a private process server in direct violation of Illinois law governing service of process constitute a "random and unauthorized" act by, or in conspiracy with, state officials?

QUESTIONS PRESENTED – Continued

5) Do Illinois remedies providing for relief from improperly-entered judgments provide all the due process required under 42 U.S.C. Section 1983 and the Fourteenth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATUTES INVOLVED 1

STATEMENT OF THE CASE 7

A. The Municipal Court Proceedings 7

B. The Chancery Court Proceedings 9

C. The Appellate Court Proceedings 11

REASONS FOR DENYING THE WRIT 11

A. THIS COURT LACKS JURISDICTION PURSUANT TO 28 U.S.C. SECTION 1257(3) 12

B. THE FACTS ALLEGED BY PETITIONERS DO NOT CONSTITUTE STATE ACTION BY RESPONDENTS 14

1. Respondents ACCURATE, KADET, and MARKS Did Not Perform A "Public Function" Transforming Their Private Conduct Into State Action 15

2. Petitioners Misapply The Joint Participation Test In An Effort To Establish State Action On The Part Of Respondents 18

C. PETITIONERS CANNOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 .. 23

1. Petitioners Are Required To Resort To State Law Remedies As The Allegations Against Respondents Assert Conduct Which Was Entirely Random And Unauthorized By The State 23

TABLE OF CONTENTS – Continued

Page

2. The Illinois Code Of Civil Procedure Provided Petitioners With Appropriate Avenues For Relief Which Were Both Adequate And Available To Them..... 24

D. PETITIONERS' CHANCERY COURT ACTION CONSTITUTED AN IMPROPER COLLATERAL ATTACK ON THE JUDGMENTS ENTERED BY THE MUNICIPAL COURT 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Blum v. Yaretsky, 457 U.S. 991 (1982) 15, 17

Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 771 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981) 18

Dennis v. Sparks, 449 U.S. 24 (1980) 22

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) 24

Flagg Bros. v. Brooks, 436 U.S. 149 (1978) 15, 17, 19, 21, 22

Gomez v. Toledo, 446 U.S. 635, 640 (1980) 14

Hudson v. Palmer, 468 U.S. 517 (1984).....24, 25

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 15, 16, 17

Lugar v. Edmonson Oil Co., 457 U.S. 22 (1982) 18, 19, 20, 21, 22

Michigan v. Tyler, 436 U.S. 499 (1978)..... 14

Moose Lodge, No. 107 v. Irvis, 407 U.S. 163 (1972)....21, 22

Orr v. Orr, 440 U.S. 268 (1979)..... 13

Parratt v. Taylor, 451 U.S. 527 (1981).....24, 25

Polk County v. Dodson, 454 U.S. 312 (1981)..... 15

Rendell-Baker v. Kohn, 457 U.S. 380 (1982).....15, 17

Shelley v. Kraemer, 334 U.S. 1 (1948) 15

United States v. Barr, 295 F.Supp. 889 (S.D.N.Y. 1969).....17, 18

Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990) 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ill.Rev.Stat., ch. 110, ¶2-202 .....1, 16

Ill.Rev.Stat., ch. 110, ¶2-203 2

Ill.Rev.Stat., ch. 110, ¶2-301 .....3, 25

Ill.Rev.Stat., ch. 110, ¶2-1301 .....3, 24, 25

Ill.Rev.Stat., ch. 110, ¶2-1401 ..... 4, 9, 24

Ill.Rev.Stat., ch. 110A, ¶301.....5, 25

S. Ct. R. 17.....5, 12

28 U.S.C. § 1257.....6, 12

42 U.S.C. § 1983..... *passim*

STATUTES INVOLVED

In addition to 42 U.S.C. Section 1983 set forth in Petitioners' Brief at Page 3, the following federal statutes and provisions from the Illinois Code of Civil Procedure are relevant to this Petition.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-202 – Persons Authorized to Serve Process – Place of Service – Failure to Make Return.**

(a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. A sheriff of a county with a population of less than 1,000,000 may employ civilian personnel to serve process. In counties with a population of less than 1,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm and Private Security Act of 1983 or by a registered employee of a private detective agency certified under that Act. A private detective or licensed employee must supply the sheriff of any county in which he serves process with a copy of his license or certificate; however, the failure of a person to supply the copy shall not in any way impair the validity of process served by the person. The court may, in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action. It is not necessary that service be made by a sheriff or coroner of the county in which service is made. If served or sought to be served by a sheriff or coroner, he shall endorse his or her return thereon, and if by a private person, the return shall be by affidavit.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-203 – Service on Individuals.**

a. Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy thereof with the defendant personally, or (2) by leaving a copy at the defendant's usual place of abode, with some person of the family, of the age of 13 years or upwards, and informing that person of the contents thereof, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. The certificate of the officer or affidavit of the person that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so.

b. The officer, in his or her certificate or in a record filed and maintained in the Sheriff's office, or other person making service, in his or her affidavit or in a record filed and maintained in his or her employer's office, shall (1) identify as to sex, race and approximate age the defendant or other person with whom the summons was left, and (2) state and place where (whenever possible in terms of an exact street address) and the date and time of the day when the summons was left with the defendant or other person.

c. Any person who knowingly sets forth in such certificate or affidavit any false statement, shall be liable in civil contempt. Where the court holds a person in civil contempt under this Section, it shall award such damages as it determines to be just and where the contempt is prosecuted by a private attorney, may award reasonable attorneys fees.

Ill.Rev.Stat., **ch. 110, ¶ 2-301 – Special Appearance.**

a. Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. This special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.

b. If the reasons for objections are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons. In ruling upon the objection, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact. In their determination of any issues of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made.

c. If the court sustains the objection, an appropriate order shall be entered. Error in ruling against the defendant on the objection is waived by the defendants taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State.

Ill.Rev.Stat., **ch. 110, ¶ 2-1301 – Judgments – Default – Confession.**

a. The court may in its discretion, before final order or judgment, set aside any defaults,

and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

***Ill.Rev.Stat.*, ch. 110, ¶ 2-1401 – Relief from Judgments.**

a. Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of Error *Coram Nobis* and *Coram Vobis*, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions or other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

b. The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by Rule.

c. The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

d. The filing of a petition under this Section does not effect the order or judgment, or suspend its operation.

e. Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not effect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor effect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based upon the order or judgment.

f. Nothing contained in this Section effects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

***Ill.Rev.Stat.*, ch. 110A, ¶ 301 – Method of Review.**

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception may be taken in order to make any ruling or action of the court reviewable.

Rule 17 of the Rules of the Supreme Court of the United States Considerations Governing Review on *Certiorari*.

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will

be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

* * *

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or federal court of appeals has decided an important question of law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. Section 1257 – State Courts; Appeal; Certiorari.

Final judgments or decrees entered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

These Respondents object to Petitioners' Statement of the Case as it fails to set forth several vital facts which required the dismissal of their suit. Consequently, Respondents offer the following statement.

A. The Municipal Court Proceedings.

Petitioners are indeed former credit card account holders of CITIBANK who had become delinquent in their accounts due to their refusal to make payments on their outstanding balances. After unsuccessful efforts to obtain payment from Petitioners for the sums due, CITIBANK hired WILK & WALLER to act as their attorneys and to file suit on their behalf against Petitioners. When the original summonses were returned unserved by the Sheriff, Petitioners were served by certain Respondents as special process servers. Following their failure to appear in court, default judgments were entered against them (App. 2).

With regard to Petitioner SCHMIDT, judgment by default was entered on May 19, 1987, and wage garnishment proceedings were instituted shortly thereafter (App. 3). Before the wage deduction summons was returnable to the court (on August 26, 1987), SCHMIDT voluntarily paid the judgment amount, and on July 10, 1987, a Release of Judgment was filed indicating that full satisfaction and payment had been received from SCHMIDT. A Stipulation by the parties to dismiss the garnishment was filed on August 18, 1987 (App. 3-4).

With regard to Petitioners CONTRERAS', the case history becomes more complex. On August 25, 1987, the Municipal Court entered a default judgment against them (App. 2). CONTRERAS' then appeared in Municipal Court on September 24, 1987, and filed a Motion to Vacate the judgment. Additionally, the CONTRERAS' filed a Petition for Rule to Show Cause against the process servers pursuant to the Illinois Code of Civil Procedure (App. 4). On October 1, 1987 the Municipal Court held a hearing on the CONTRERAS' Motion to Vacate. After hearing argument and expressing its displeasure with CONTRERAS' motion, specifically the acknowledgment that they had no meritorious defense to the collection action, the court continued the hearing to October 15, 1987 at 2:00 p.m. (App. 12-17). On October 13, 1987, they requested leave to withdraw the Petition for Rule to Show Cause (App. 4).

Then, at 1:18 p.m. on October 15, 1987, CONTRERAS' filed the present law suit in the Chancery Division of the Circuit Court of Cook County, Illinois (App. 4). Over forty minutes later, the CONTRERAS' appeared in the Municipal Division of the Circuit Court on their still-pending motions in the *Citibank v. Contreras* action (App. 4). Without informing CITIBANK's counsel (WILK & WALLER) that they had filed a separate lawsuit earlier that day in the Chancery Division, Mr. Regulski, the CONTRERAS' attorney, tendered his own personal check to WILK & WALLER to pay in full the outstanding balance owed to Citibank. (App. 4). Mr. Regulski then presented a *typewritten* agreed order dismissing the *Citibank v. Contreras* case and withdrawing all previously filed motions in that case.

B. The Chancery Court Proceedings.

Petitioners' complaint was designated as a "class action" lawsuit. No class was ever certified, and moreover, Petitioners had specifically excluded themselves from membership in any class the complaint attempted to define. The complaint requested that the Chancery Division vacate and declare void the judgments rendered in the Municipal Division.

Respondents filed motions to strike the original complaint and to disqualify Mr. Regulski as a result of his involvement in the scheme to engineer the present lawsuit. The motions also asserted that Petitioners had submitted to the jurisdiction of the Municipal Court when they voluntarily settled their lawsuits and by moving (in the CONTRERAS' case) to vacate the judgment.

Chancery Court Judge Albert Green dismissed the complaint *sua sponte*, pointing out that the Chancery Division

> . . . is not a Court of Appeals . . . [and] the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void.
>
> App. 19.

Judge Green denied Petitioner's Motion for Reconsideration, instructing Petitioners that a motion for relief from the judgment should have been filed in the Municipal Court proceedings pursuant to Section 2-1401 of the Illinois Code of Civil Procedure.

Ignoring Judge Green's instructions, Petitioners filed an amended complaint, purporting to allege causes of

action for conspiracy to violate their civil rights in violation of 42 U.S.C. Section 1983, a violation of their civil rights, common law fraud, a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, purported causes of action under the Illinois Code of Civil Procedure, and negligent hiring and failure to supervise (App. 6). In each separate claim, Petitioners demanded in their prayer for relief that the judgments of the Municipal Court be vacated and declared void. Additionally, Petitioners claimed entitlement to $2,500,000 in compensatory damages and $5,000,000 in punitive damages (App. 8).

Respondents again each moved to dismiss the amended complaint on the basis that Petitioners were using the Chancery Division as a means of launching an improper collateral attack against the judgments rendered by the Municipal Court, a court of concurrent jurisdiction, and that each of the separate counts failed to state causes of action. Pursuant to these motions, the court dismissed the amended complaint on July 26, 1988, finding that (1) Petitioners were attempting to skirt the appropriate procedures for attacking the Municipal Court judgments by bringing a concurrent action in the Chancery Court, (2) there was no state action present (3) the amended complaint failed to allege the elements necessary to establish fraud, (4) there was no independent cause of action based on alleged violations of the Illinois Code of Civil Procedure, and (5) the amended complaint failed to allege sufficient facts establishing a cause of action for negligent hiring and supervision (App. 6-7).

C. The Appellate Court Proceedings.

Petitioners chose to stand on Count I of their original complaint and their amended complaint and appealed to the Illinois Appellate Court (App. 7). The Appellate Court found that Petitioners were simply "forum shopping" and that Petitioners refused to pursue the avenues for relief from judgments provided under the Illinois Code of Civil Procedure (App. 8-10). The Illinois Supreme Court declined to hear Petitioners' appeal (App. 11), and Petitioners have thus filed the instant Petition for Writ of *Certiorari*.

REASONS FOR DENYING THE WRIT

Petitioners have confined their Petition to challenges on the Illinois courts' refusals to allow them to circumvent the procedures provided in the Illinois Code of Civil Procedure for obtaining relief from judgments by dismissing their complaints (and upholding those dismissals) on the grounds that Petitioners were "forum shopping", and attempting to improperly collaterally attack judgments entered in a court of concurrent jurisdiction; Petitioners also contest the rejection of their Section 1983 claims, choosing to now characterize their entire case as being of constitutional dimension.

Petitioners are simply seeking to have any forum other than the Municipal Department of the Circuit Court of Cook County vacate judgments entered against them by that court – on amounts which they admit that they owed – and then award them $7,500,000. They have

attempted – and have repeatedly failed – to state a myriad of causes of action from constitutional deprivations to violations of the Illinois Code of Civil Procedure, and even common-law causes of action.

For the reasons set forth below and for those set forth in the Brief filed by the other Respondents, the Petition for Writ of *Certiorari* should be denied.

A. THIS COURT LACKS JURISDICTION PURSUANT TO 28 U.S.C. SECTION 1257(3).

These Respondents object to Petitioners' assertion that this Court has jurisdiction pursuant to the provisions allowing for review by way of Writ of *Certiorari* under 28 U.S.C. Section 1257(3). Rule 17 of the rules of the Supreme Court of the United States governs situations under which the Court may review a matter on a writ of *certiorari*. Rule 17 specifies that the Court may exercise its discretion to review a case on a writ of *certiorari* when a state court "of last resort" has decided a federal question in a manner which is inconsistent with cases decided by this Court. S. Ct. R. 17.1(b) and (c).

As a review of the history of this case makes clear, Petitioners' various causes of action have been repeatedly dismissed and rejected on the grounds that they constituted an improper collateral attack on the judgments rendered in the Municipal Court. Initially, the Chancery Court dismissed the original complaint, *sua sponte*, on this basis and denied Petitioners' motion for reconsideration for the same reasons. Then, the Chancery Court again dismissed Petitioners' amended complaint, finding that,

> . . . by way of the nature of the relief prayed for, returning sums obtained through "void" judgments, plaintiff[s] continue to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating those judgments.
>
> For these reasons this court will dismiss plaintiff's First Amended Complaint.
>
> Once more, listen to me carefully, I am going to grant you the right to file a Second Amended Complaint to see if you can meet muster. This case, if you can meet muster, should be transferred to the court of original jurisdiction wherein the judgments were granted.
>
> App.23

The court also stated additional grounds for dismissing Petitioners' Amended Complaint, although it is clear that the underlying basis for dismissal was rejection of Petitioners' collateral attack.

Indeed, the Appellate Court denied Petitioners' appeal solely on the basis that Petitioners were forum shopping and had failed to seek relief from the questioned judgments in the manner provided by the Illinois Code of Civil Procedure. Thus, it is clear that the Illinois Appellate Court opinion – the final decision from which Petitioners seek relief – did not address in any regard, or reach or pass upon any substantial federal question. Where "an independent and adequate state ground" formed the basis for dismissal of the suit, despite the possibility of reaching a federal question, the Court is "without power to hear the constitutional question." *Orr v. Orr*, 440 U.S. 268, at 274-276 (1979).

Further, in *Michigan v. Tyler*, 436 U.S. 499 (1978) the Court stated:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, . . .
>
> – *Id.*, at 512, n.7.

The Illinois Appellate Court ruling was based entirely on procedural impropriety, and not regarding the sufficiency of Section 1983 claims. The absence of any federal question legitimately raised by the Petition for Writ of *Certiorari* deprives this Court of jurisdiction pursuant to 28 U.S.C. Section 1257 (3) and Rule 17 of the Rules of the Supreme Court of the United States.

In the event this objection to this Court's jurisdiction is rejected, the following arguments are offered in opposition to the Petition for Writ of *Certiorari*.

B. THE FACTS ALLEGED BY PETITIONERS DO NOT CONSTITUTE STATE ACTION BY RESPONDENTS.

To state a claim under 42 U.S.C. Section 1983, Petitioners must establish that Respondents "acted under color of state or territorial law". *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Although Petitioners allege that Respondents acted "under color of law" (First Amended Complaint, ¶¶ 12-13) the additional facts asserted illustrate that the "state action" requirement of Section 1983 and the Fourteenth Amendment has not been satisfied.

Merely private conduct, no matter how improper, is insufficient to invoke the protection of the Fourteenth

Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948). In the instant case, Respondents ACCURATE, RANDY KADET, MARILYN KADET and SCOTT MARKS engaged in the private enterprise of providing services as special process servers. This private conduct does not constitute state action. Moreover, an attorney's actions in representing his clients do not constitute state action. *Polk County v. Dodson*, 454 U.S. 312 (1981). In the present case, these Respondents worked exclusively as agents for private attorneys, and therefore it follows that they are not state actors.

1. Respondents ACCURATE, KADET, and MARKS Did Not Perform a "Public Function" Transforming Their Private Conduct into State Action.

Regardless of how Petitioners now choose to characterize and tailor their claims, their complaints specifically allege that Respondents "RANDY KADET or SCOTT MARKS performed a state function", thereby satisfying the state action requirement of Section 1983 (First Amended Complaint, ¶54).

In only a few, limited circumstances has this Court found state action in cases where the defendant was performing a public function. The "public function test" requires that the defendant's acts be historically and traditionally governmental in nature and "the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). *Accord, Rendell-Baker v. Kohn*, 457 U.S. 380 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

In the present case, Respondents' acts were not historically left exclusively to the state, and in fact, Section 2-202 of the Illinois Code of Civil Procedure provides that a court may appoint a "private person" for the service of process. *Ill.Rev.Stat.*, ch. 110, ¶2-202(a). Moreover, Illinois has provided for the service of process by private individuals since 1872, about as long as the Fourteenth Amendment has existed. *See*, S.H.A., ch. 110, ¶2-202(a), Historical Practice Notes.

In arguing that a private business performing special process service constitutes state action under the public function test, Petitioners cite New York state and federal case law which consists entirely of out-dated lower court decisions. *See*, Petitioners' Brief, pp. 22-25.

The time period of the cases cited by Petitioners is significant. An analysis of the cases decided by this Court in the last twenty years reveals a marked turnaround in the approach taken by the Supreme Court after the appointment of Warren E. Burger as Chief Justice. It is important to note that the post-Warren Court has *never* found state action to exist under the public function doctrine, and in fact, on numerous occasions, reversed decisions from the Second Circuit – the very circuit providing the basis of authority for Petitioner's argument – by holding that no state action was present.

This result can be traced directly to the strict approach adopted in *Jackson v. Metropolitan Edison Co., supra*, in which the Court, in a conscious attempt to greatly reduce the purview of the public function doctrine, added the stringent requirement that not only must

the questioned act be a function which has been historically and traditionally governmental in nature, but also, that the function has been "exclusively reserved to the State". 419 U.S., at 352.

Following the hard line articulated in *Jackson*, the Court has continued to reject the public function test, requiring that in order to meet the requirements of the public function doctrine, it is imperative that the function be one that is historically left *exclusively* to the state. *Flagg Bros. v. Brooks, supra; Rendell-Baker v. Kohn, supra; Blum v. Yaretsky, supra.* Indeed, the public function test is now clearly viewed with disfavor.

Despite the obvious contrary evolution of the public function doctrine under Supreme Court directives, Petitioners desperately rely on lower court decisions from forums with stark paucity of precedential value in the wake of this Court's rulings in *Jackson* and its progeny.

> These decisions sent out clear messages to the lower federal courts as to how the state action test should be applied. Therefore, in evaluating the decisional law in this area, one must consider the continued validity of older precedents in light of these more recent developments. Pre-Burger Court lower courts' decisions in which state action was found might not be decided the same way under the Supreme Court's present approach.
>
> Schwartz and Kirklin, *Section 1983 Litigation*, 102 (1986).

To further illustrate the glaring deficiency in Petitioners' analysis, consider their reliance on *United States v. Barr*, 295 F.Supp. 889 (S.D.N.Y. 1969). Petitioners cite

Barr for the proposition that when a special process server performs a function of the sheriff, state action is present under the public function doctrine (Petitioners' Brief, p. 24). However, much more recently, in accordance with this Court's rulings, the United States Court of Appeals for the 9th Circuit in *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981), held that an association of private citizens acting as the sheriff's posse did not constitute state action, despite obviously performing a function of the sheriff. *Canlis* further demonstrates that the post-Warren Supreme Court decisions have effectively invalidated each of those cases relied upon by Petitioners. *Canlis* also indicates that the lower federal courts are now following the Supreme Court in giving the public function test a very narrow interpretation.

Following these recent rulings, Respondents' performance of their duties as special process servers and attorneys did not constitute state action.

2. Petitioners Misapply The Joint Participation Test In An Effort To Establish State Action On The Part Of Respondents.

Although Petitioners' amended complaint specifically alleges state action only on the basis of the public function doctrine, they now attempt to employ the joint participation test as well. In support, Petitioners rely heavily on *Lugar v. Edmonson Oil Co.*, 457 U.S. 22 (1982). However, *Lugar* is misapplied by Petitioners.

The Court in *Lugar* made it clear that the joint participation test shall apply solely to deprivations under Section 1983 caused by improper prejudgment attachments of property, which is obviously not an issue in this case. In listing the various tests to determine whether state action is present:

> . . . The Court has articulated a number of different factors or tests in different contexts; e.g., the "public function" test, (citations omitted); the "state compulsion" test, (citation omitted); the "nexus" test (citations omitted); and *in the case of prejudgment attachments*, a "joint action test," *Flagg Brothers*, 436 U.S., at 157, 98 S.Ct., at 1734.
>
> *Lugar, supra*, at 939. (Emphasis added.)

In a corresponding footnote, the Court further clarified the narrow scope of its holding:

> Contrary to the suggestion of Justice Powell's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the Section 1983 requirement of action under color of law." [citation omitted]. The holding today, as the above analysis makes clear, is *limited to the particular context of prejudgment attachment*.
>
> *Id.*, at 940, n.21. (Emphasis added.)

The Court could not have made it more clear that its ruling in *Lugar* and the joint participation test are to apply only to cases involving prejudgment attachments of property. Therefore, Petitioners' reliance on this test and *Lugar* are inappropriate under the facts alleged.

Moreover, the language used in *Lugar*, in analyzing the joint participation test, eliminates any possibility of finding state action by Respondents. In determining that the petitioner in *Lugar* failed to state a cause of action under Section 1983 – finding instead that the complaint merely attacked private action – the Court determined that the petitioner's allegation that the respondent's actions were "unlawful" under state law was merely,

> . . . to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, . . . That respondents have invoked the statute without the ground to do so could in no way be attributed to a state rule or a state decision.
>
> *Id.* at 940.

Likewise, under the facts alleged by Petitioners here, they admit that the purported actions occurred without any governmental intervention or decision whatsoever. For example, the Amended Complaint (¶¶ 20-24) alleges that RANDY KADET made service upon DONNA CONTRERAS prior to July 13, 1987, the date on which an order appointing RANDY KADET as special process server was entered. At most, as in *Lugar*, the alleged conduct complained of is "unlawful under state law", and is therefore only private action.

Petitioners seem to propose that the misuse of a state statute by a private party constitutes state action for purposes of Section 1983. Not only is such a proposition

entirely unsupported by any of the cases cited by Petitioners, but also, it is directly contradicted by *Lugar*. Addressing this issue in *Lugar*, the Court stated:

> . . . private misuse of a state statute does not describe conduct that can be attributed to the State . . .
>
> *Id.*, at 941.

Accordingly, *Lugar* – the very cornerstone of Petitioners' argument – completely deflates the assertions of state action.

Further, in *Lugar*, the Court analyzed extensively its previous decisions in *Moose Lodge, No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Flagg Brothers, supra*, both of which held that simply acting pursuant to statutory authority does not amount to state action. In *Moose Lodge*, the Court rejected a diner's Section 1983 claim against the Moose Lodge for its refusal to serve him, despite the fact that the Moose Lodge operated under authority of the State Liquor Control Board. Similarly, in *Flagg Brothers*, the Court refused to find state action where the challenged acts were statutorily authorized by the State. Summarizing these rulings, the *Lugar* Court stated:

> . . . action by a private person pursuant to [a] statute, without something more, was not sufficient to justify a characterization of that party as a "state actor".
>
> 457 U.S., at 939.

Under the reasoning suggested by Petitioners here, if a private process server commits any wrongdoing in the course of his work, he must be viewed as an agent of the State solely because he operates under statutory authority pursuant to the Illinois Code of Civil Procedure. Any

business operating under Illinois statutory authority would, according to Petitioners' argument, be acting under color of law for state actions purposes. This argument has been specifically rejected in *Moose Lodge* and *Flagg Brothers*.

In a rather off-handed fashion, Petitioners also cite *Dennis v. Sparks*, 449 U.S. 24 (1980), a joint participation case decided approximately two years prior to the narrowing of the scope of that test in *Lugar* to situations involving only prejudgment attachments of property. In *Dennis*, the Court held that the plaintiffs' allegations that the defendants conspired with a Texas state court judge in issuing an injunction against their interests asserted conduct under color of state law within the meaning of Section 1983.

Dennis, if it may still be relied upon in the wake of *Lugar*'s limiting language, is easily distinguished from the facts alleged here. In *Dennis*, the two co-conspirators allegedly participated with the judge in reaching an agreement for bribes offered in exchange for the issuance of the injunction. The Court noted that the judge was an officer of the state with whom the co-conspirators willfully participated in depriving the plaintiffs' due process. *Dennis, supra*, at 27-28. Here, there is no suggestion that any of the Respondents "willfully participated" with any state officer in conspiring to deprive Petitioners' of their civil rights. The facts alleged here merely complain of a private violation of the court's procedural rules. The facts of this case are not even remotely analogous to those present in *Dennis*, and therefore, its application here is misplaced.

C. PETITIONERS CANNOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983.

Among the many state law causes of action attempted to be asserted by Petitioners, they have also claimed a violation of 42 U.S.C. Section 1983, apparently contending that they have been deprived of liberty or property without due process of law.[1] Petitioners assert that their procedural due process rights were denied (as opposed to any substantive constitutional claim) when judgments were entered against them on credit card accounts which they admit they owed, without (allegedly) having been giving proper notice of the pending lawsuits against them.

1. Petitioners Are Required To Resort To State Law Remedies As The Allegations Against Respondents Assert Conduct Which Was Entirely Random And Unauthorized By The State.

Petitioners pose among their "Questions Presented for Review",

> Whether a person must exhaust all state court judicial remedies before bringing an action under 42 U.S.C. Section 1983.
>
> Petitioners' Brief, p. "i".

This court has repeatedly held that the answer to this question under claims and circumstances such as those

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[1] It is quite doubtful that Petitioners could establish the deprivation of any property interest where they admit they owed and voluntarily paid the judgment amounts entered in the trial court.

present here is "yes". *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990). In those cases, this Court held that random and unauthorized deprivations of liberty or property by public officials must be redressed through state remedies, if they exist, in state forums. Therefore, even if Respondents' actions could somehow be construed as constituting state action, because those acts (as alleged) were clearly unforeseen and unauthorized by the State, Petitioners are required to resort to "post-deprivation" remedies made available by the State. *See, Easter House v. Felder*, 910 F.2d 1387, 1405-1407 (7th Cir. 1990) (*en banc*).

Here, Petitioners have set forth no facts which appear as being anything other than random and unauthorized by the State. To the contrary, they claim that Respondents acted in direct contravention of State policy and procedures. Therefore, Under *Parratt*, *Hudson*, and *Zinermon*, Petitioners' claims must be subjected to the inquiry of the availability of state-law relief.

2. The Illinois Code of Civil Procedure Provided Petitioners with Appropriate Avenues for Relief Which Were Both Adequate and Available to Them.

As each of the courts below have carefully pointed out to Petitioners, the Illinois Code of Civil Procedure sets forth the proper manner for obtaining relief from challenged judgments. Specifically, Sections 2-1301(e) and 2-1401 of the Code allow a person to challenge a judgment by returning to the court which entered it and

attack it there. Section 2-301 permits the "Special Appearance" by a party for the purpose of contesting personal jurisdiction. Further, Illinois also provides for the review of a final judgment through its appellate courts of review. *Ill.Rev.Stat.*, ch. 110A, ¶ 301. Finally, as Judge Albert Green repeatedly instructed Petitioners in the Circuit Court, they might have had a valid state law cause of action for common law fraud, if they could have properly pled such a claim. *Parratt* and *Hudson* dictate that where adequate state law remedies are available under these circumstances, no Section 1983 claim can be stated.

There has never been a finding that an individual has been denied procedural due process based upon a claimed deprivation of property or liberty where an extensive array of state procedures exists to remedy any actual deprivation, especially where the individual has chosen to abandon those remedies. Why have Petitioners tried so persistently to avoid these state remedies? The courts reached a very simple conclusion: "forum shopping", as they have correctly refused to accommodate Petitioners' misuse and rejection of Illinois' procedural rules.

Finally, it is inconceivable that individuals can claim that they have not been provided adequate due process where they have voluntarily submitted to the jurisdiction of the court by appearing there, voluntarily settling and satisfying all claims against them, and then stipulating to dismiss those actions. Even more incredible are CONTRERAS' claims in light of their having invoked their rights under Section 2-1301 by filing, arguing and voluntarily withdrawing their motion to vacate the default

judgment. Consequently, Petitioners cannot state a Section 1983 cause of action.

D. PETITIONERS' CHANCERY COURT ACTION CONSTITUTED AN IMPROPER COLLATERAL ATTACK ON JUDGMENTS ENTERED BY THE MUNICIPAL COURT.

For their Response to the portion of the Petition for Writ of *Certiorari* which asserts that the Illinois Circuit Court (Chancery Division) and Appellate Court improperly dismissed their complaints as being improper collateral attacks on the judgments, these Respondents adopt and join in those portions of the remaining Respondents' Briefs which address this issue.

CONCLUSION

The Petition for Writ of *Certiorari* fails to establish any resolution of a Federal question by an Illinois court of last resort, and therefore there is no jurisdiction to review this matter on a writ of *certiorari*. Further, Petitioners many claims were properly rejected by the Illinois courts and those rulings should not be disturbed. For these reasons, the Petition should be denied.

Respectfully submitted,

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